93-804

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1993

LINDSEY, STEPHENSON & LINDSEY,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES R. WATSON, JR.

CULTON, MORGAN,
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QUESTIONS PRESENTED

1. Whether the terms "liability on a claim" and "claim" are synonymous for purposes of determining a family farmer's eligibility for protection under Chapter 12 of the United States Bankruptcy Code.

2. Whether the plain meaning of a statutory definition may be altered by legislative history or by precedent construing its meaning in other areas of the statute.

PARTIES TO THE PROCEEDING

The petitioner, Lindsey, Stephenson & Lindsey, is a partnership composed of Tommy Wayne Lindsey, Jacquelynn Jo Stephenson and Jo Carol Stephenson, d/b/a Great Plains Land & Cattle. The respondent, Federal Deposit Insurance Corporation, appears in its corporate capacity.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Petition 4

Conclusion 10

Appendix A 1a

Appendix B 9a

Appendix C 14a

Appendix D 16a

TABLE OF AUTHORITIES

Cases: Page

Barnhill v. Johnson, 503 U.S. ___, 112 S.Ct. 1386 (1992) 8
Dewsnup v. Timm, 502 U.S. ___, 112 S.Ct. 773 (1992) 6
Johnson v. Home State Bank, 501 U.S. ___, 111 S.Ct. 2150 (1991) 3, 4, 6, 9
Patterson v. Shumate, 504 U.S. ___, 112 S.Ct. 2242 (1992) 6
Matter of Pearson, 773 F.2d 751 (6th Cir. 1985) 5, 8
Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S.Ct. 2126 (1990) 3, 4, 6, 7
Union Bank v. Wolas, 502 U.S. ___, 112 S.Ct. 527 (1992) 6
United States v. Nordick Village, 503 U.S. ___, 112 S.Ct. 1011 (1992) 8

Statutes:

11 U.S.C. § 101(12) 2, 3
11 U.S.C. § 101(18)(B)(ii) 2, 3
11 U.S.C. § 102(2) 3, 7, 8
11 U.S.C. § 109(f) 2
28 U.S.C. § 158(a) 3
28 U.S.C. § 1254(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDSEY, STEPHENSON & LINDSEY,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

PETITION FOR A WRIT OF CERTIORARI

Lindsey, Stephenson & Lindsey, a family farming partnership, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 995 Fed. 2nd 626. The opinion of the district court (App. 9a-13a) is reported at 158 B. R. 75. The opinion of the bankruptcy court (App. 14a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. The order on rehearing was entered on August 23, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The eligibility provisions for Chapter 12 of the Bankruptcy Code begin with 11 U.S.C. § 109(f) which states:

> Only a family farmer with regular annual income may be a debtor under chapter twelve of this title.

In turn, 11 U.S.C. § 101(18)(B)(ii) states that in the context of a partnership "family farmer" means:

> [I]ts aggregate debts do not exceed in $1,500,000 and not less than 80 percent of its aggregate noncontingent liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principle residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership . . . .

Under 11 U.S.C. § 101(12) "Debt":

> [M]eans liability on a claim.

STATEMENT

This case arises under Chapter 12 of the Bankruptcy Code. It addresses the proper construction of the Code's provisions determining family farmers' eligibility for bankruptcy protection.

The Debtor, Lindsey, Stephenson & Lindsey, is a family partnership engaged in farming operations in the Texas Panhandle. The partnership sought Chapter 12 protection. The bankruptcy court ordered the Chapter 12 proceedings dismissed permitting the FDIC to foreclose the liens it held on the partnership's land. (App. 15a).

The bankruptcy court held that Lindsey was not eligible for Chapter 12 relief because its aggregate debts exceeded the $1,500,000 debt limitation imposed by 11 U.S.C. § 101(18)(B). (App. 14a-15a). The issue was whether a non-recourse note could be construed as part of a family farmer's aggregate debts. To aid in that determination the parties' had stipulated that the non-recourse note held by the FDIC exceeded the sum of $1,500,000.

Lindsey maintained that the FDIC's note could not affect eligibility for bankruptcy protection because section 101(18)(B)(ii) defines Chapter 12 eligibility in terms of "aggregate debts." The Code, in turn, defines "debt" as "liability on a claim" in section 101(12). The bankruptcy court rejected Lindsey's argument that the express language of the note precluded liability on the FDIC's claim.

Lindsey appealed to the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 158(a). The district court affirmed, concluding that a claim on which there is no liability is a debt for purposes of determining Chapter 12 eligibility. (App. 13a). The district court's decision was based upon legislative history of the Code's definition of "claim against a debtor", 11 U.S.C. § 102(2), a term not used in Chapter 12's eligibility scheme, as well as this Court's opinions in *Johnson v. Home State Bank*, 501 U.S. _____, 111 S.Ct. 2150 (1991) and *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126

(1990) construing the terms "debt" and "claim" as coextensive in the limited context of the reorganization and discharge of consumer debts under Chapter 13.

The Fifth Circuit affirmed, holding that there is no distinction between "debt" and "claim" for purposes of the Bankruptcy Code. (App. 6a). Relying upon *Davenport*, *Johnson* and legislative history, the court held that the FDIC's claim constituted part of Lindsey's debt notwithstanding the requirement that there be "liability" on the claim before it could be considered a debt. (App. 7a). The court buttressed its decision by holding that even if the term "claim" could have a broader meaning than "debt" for purposes of the Code, the FDIC's right to look to Lindsey's property to satisfy the note created a form of liability against the collateral. (App. 8a). Neither the parties nor the court of appeals addressed the value of the property securing the FDIC's note.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision raises issues of national significance concerning the proper construction of the bankruptcy code's eligibility requirements. The decision is in conflict with decisions of the Sixth Circuit construing comparable requirements under Chapter 13 of the Code.

Equally significant is the confusion and inconsistent interpretations caused by the lack of an articulated policy of statutory construction that may be consistently applied by the bench and bar. Nowhere is that void move apparent than in construction of the Bankruptcy Code's eligibility requirements. In this instance, the effect of rewriting the Bankruptcy Code's eligibility requirements provides creditors with the means to bar farmers from the protection Congress sought to establish

by enacting Chapter 12. It is respectfully submitted that this Court should grant this petition for a writ of certiorari.

1. The terms "liability on a claim" and "claim" are not always synonymous.

Congress did not use the terms "debt" and "claim" interchangeably in defining bankruptcy eligibility. In the context of Chapters 12 and 13, Congress viewed eligibility from the perspective of the debtor by defining eligibility in terms of "debts" which require "liability" on a claim. The Sixth Circuit expressed that view in *Matter of Pearson*, 773 F. 2nd 751 (6th Cir. 1985) while construing Chapter 13's comparable eligibility requirements. The Sixth Circuit held that the statute used the term "debt" instead of "claim" because:

> Congress did not wish the section 109(e) eligibility determination for Chapter 13 debtors to be predicated upon the mere demands of creditors.

Id. at 751. The Fifth Circuit's subsequent determination that the terms "debt" and "claim" are interchangeable for purposes of determining eligibility under Chapter 12 has created considerable confusion. The decisions cannot be reconciled.

The text specifically requires "liability" on claims before they can be considered debts. Though all debts may fall within the Bankruptcy Code's broad definition of "claim" only claims imposing liability may fall within the narrower definition of "debt." To hold that "liability" on a claim is not relevant to Chapter 12 eligibility is to rewrite the plain meaning of the statute's eligibility requirements.

2. Precedent and Legislative History Should not Alter the Statute's Plain Meaning.

The court of appeals relied upon this Court's holdings in *Pennsylvania Dept. of Public Welfare v. Davenport*, and *Johnson v. Home State Bank*, to hold that the terms "debt" and "claim" are coextensive for all purposes under the Code. While both holdings are correct in the limited context of determining the dischargeability of a "claim" in Chapter 13 bankruptcy, neither should control the initial determination of a debtor's eligibility for protection under Chapter 12.

The court of appeals added uncertainty to the confusion already surrounding statutory construction by holding that precedent construing a term in one part of the Bankruptcy Code requires imposition of the same meaning in another context. Under the plain meaning doctrine of construction, precedent should not override clearly expressed Congressional language in contexts not considered by Court in the prior opinion. Judicial interpretation and the precedent it generates should be reserved for those instances in which Congressional intent cannot be derived from the language of the statute alone. *See e.g. Union Bank v. Wolas*, 502 U.S. ____, 112 S.Ct. 527 (1992) (Scalia, J. concurring). The holding of the court of appeals is, therefore, contrary to this Court's holdings in *Dewsnup v. Timm*, 502 U.S. _____ n.3, 112 S.Ct. 773, (1992) and *Patterson v. Shumate*, 504 U.S. ____, 112 S.Ct. 2242 (1992), restricting the interpretation of a term to subsection of the Bankruptcy Code at issue.

This case illustrates the danger of elevating precedent from other contexts over the words chosen by Congress. *Johnson v. Home State Bank* did not deal with Chapter 12's "aggregate debts" requirement for bankruptcy relief. Instead, this Court was required to determine whether a creditor's claim

under a mortgage lien could be included in a Chapter 13 reorganization plan even though the debtor's personal liability had been discharged in a prior bankruptcy proceeding. The court focused on the broad definition of the term "claim" in holding that "in such a circumstance" the mortgage lien "remains a 'claim' against the debtor that can be rescheduled under Chapter 13."

The issue before the court of appeals was not whether the FDIC has a "claim." The question was whether there must be "liability" on that claim before it can be characterized as a "debt" in determining eligibility for Chapter 12 relief. Nothing about the *Johnson* opinion indicates that this Court intended to rewrite Chapter 12's eligibility requirements.

Neither did *Pennsylvania Dept. of Public Welfare v. Davenport* deal with Chapter 12's "aggregate debts" requirement for bankruptcy eligibility. The case dealt solely with whether court-imposed restitution was dischargeable in a Chapter 13 consumer bankruptcy. 495 U.S. at 555. Again, the Court's expansive definition of the term "claim" has no bearing on the case at hand. The Court was reluctant to render any language employed by Congress, mere surplusage. *Id.* at 562. That is precisely what happened when the Fifth Circuit eliminated the requirement that there be "liability" on a claim from Congress' requirements for Chapter 12 eligibility.

The Fifth Circuit was equally mistaken in eliminating the requirement of liability based upon legislative history. Had Congress intended for creditors to control access to bankruptcy, it could have defined eligibility based solely upon "claims." It did not. Neither did it define eligibility in terms of "claims against a debtor" which would have included

"claims against property of the debtor." Section 102(2).[1] Instead, claims defined eligibility in terms of claims upon which there was "liability."

The fact that "debt" and "claim" are often coextensive does not mean they are always coextensive. Yet, the court of appeals held that debts and claims are indistinguishable by employing a general statement of legislative history that the terms are coextensive to supersede the definitions employed by the text of the statute.

The decision again conflicts with the Sixth Circuit which found the legislative history to be imprecise, and declined to permit it to nullify the plain language of the text. *Pearson*, 773 F.2d at 755. That holding is consistent with this Court's more recent holdings that, because legislative history is not part of the text, it has no use unless the statute is ambiguous. *United States v. Nordick Village*, 503 U.S. ____, 112 S.Ct. 1011 (1992) and *Barnhill v. Johnson*, 503 U.S. ____, 112 S.Ct. 1386 (1992).

3. Effect of the Court of Appeals Decision.

The adverse effects of the Fifth Circuit decision are of national significance. Determining eligibility for bankruptcy relief on the basis of the mere assertion of a claim represents a fundamental shift in perspective. As noted by the Sixth Circuit, Congress did not intend for creditors to control access to bankruptcy relief. The court of appeals decision grants that power to creditors.

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[1] "Claims against a debtor" is used twenty times in the Bankruptcy Code but only once in Chapter 12, in the context of the reorganization plan at section 1222(b).

For example, in Texas a creditor seeking to preempt Chapter 12 reorganization now need only file suit asserting a colorable claim for punitive damages in excess of the statutory "aggregate debt" ceiling to have asserted a claim precluding Chapter 12 eligibility. Such a weapon is far too potent not to used. Congress' attempt to save the family farm is threatened by the court of appeals' decision to permit creditors' claims control eligibility for Chapter 12 protection.

The court of appeals' alternative holding that Lindsey is ineligible for Chapter 12 protection because its property is liable on the FDIC's claim raises additional problems. That conclusion is apparently based on the concept of in rem liability discussed in *Johnson v. Home State Bank*. However, as applied by the Fifth Circuit, the concept ignores the traditional rule that in rem liability is limited to the value of the property that forms the basis of the liability. Ignoring that limitation in the context of eligibility ceilings will inevitably result in inequitable results not envisioned by Congress.

For example, it is not uncommon for farming families to pledge otherwise unincumbered collateral to secure the debt of a family member. A farmer with debts of only $100,000 might pledge an otherwise debt free $50,000 tractor as collateral to help secure a son or daughter's $1,500,000 farm loan. After a flood destroyed his crops, the farmer would likely attempt to reorganize under Chapter 12, thinking his aggregate debts were, at most, $150,000. However, under the court of appeals decision, no thought would be given to limiting his in rem liability to the $50,000 value of the tractor. If he resided in the Fifth Circuit, his "aggregate debts" would be $1,600,000, barring his attempt to reorganize a debt of $150,000.

Congress specifically restricted Chapter 12's eligibility requirement to the extent of "liability" on a claim. Judicial recodification of eligibility requirements will inevitably result in the denial of the central purpose of Chapter 12: To retain the vanishing family farm by permitting family farmers to reorganize their debts based on seasonal and often sporadic income from crop sales.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES R. WATSON, JR.,
CULTON, MORGAN, BRITAIN & WHITE
A Professional Corporation

ATTORNEYS FOR PETITIONER,
LINDSEY, STEPHENSON & LINDSEY

MATTER OF LINDSEY, STEPHENSON & LINDSEY

**In the Matter of Lindsey,
Stephenson & Lindsey, Debtor.**

**LINDSEY, STEPHENSON & LINDSEY,
d/b/a Great Plains Land & Cattle,
Appellant,**

v.

**FEDERAL DEPOSIT INSURANCE
CORPORATION, Appellee.**

**No. 92-9025
Summary Calendar.**

United States Court of Appeals,
Fifth Circuit.

July 21, 1993.

FDIC moved for relief from automatic stay and dismissal of Chapter 12 case. The Bankruptcy Court granted the motions, and debtor appealed. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., affirmed, and debtor appealed. The Court of Appeals held that nonrecourse obligation was "debt" under Bankruptcy Code that had to be included in determining whether amount of debtor's obligations precluded Chapter 12 eligibility.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

Lindsey, Stephenson & Lindsey (Lindsey), a partnership, filed a petition in bankruptcy court seeking protection under Chapter 12 of the Bankruptcy Code as a family farmer. Contending that Lindsey did not meet Chapter 12's eligibility requirements, the Federal Deposit Insurance Corporation (FDIC) moved for relief from the automatic stay against property of the estate and for dismissal of the case. The bankruptcy court granted FDIC's motions. Lindsey appealed to the district court, which affirmed. Lindsey now appeals the district court's judgment to this court. We affirm.

I. Factual and Procedural Background

Since 1982 Lindsey has been a family partnership whose principal business consists of grain farming and leasing. On September 16, 1985, Lindsey's partners executed a nonrecourse note to Panhandle Bank & Trust Company for the principal amount of $1,069,612.17. As with any nonrecourse obligation, the note limited possible remedies:

> The undersigned shall not be personally liable for the payment . . . it being understood that the payee shall look only to the collateral as and to the extent provided by those certain Deeds of Trust and Security

> Agreements entered into by the undersigned and PANHANDLE BANK & TRUST COMPANY . . . .

The collateral on the note included partnership property located in Hutchinson, Randall and Deaf Smith Counties, Texas. When Panhandle failed in December, 1986, FDIC was appointed as its receiver and subsequently purchased the note in its corporate capacity.

In February, 1988, Lindsey made its last payment on the note. FDIC commenced a judicial foreclosure action in September, 1990. Three months later Lindsey filed for Chapter 12 protection. Its creditors at the time included only FDIC and taxing entities. This appeal focuses entirely on Lindsey's obligation to FDIC.

In bankruptcy court, FDIC contended that lindsey does not qualify for Chapter 12 protection. Under 11 U.S.C. § 101(18)(B)(ii), in order to qualify for Chapter 12 protection, a partnership must have no more than $1,500,000 of aggregate debt. Moreover, at least eighty percent of the debt must arise from farming operations. 11 U.S.C. § 101(18)(B)(ii). At trial the parties stipulated that the remaining balance on the FDIC note exceeded $1,500,000. The parties also stipulated that more than twenty percent of the balance due on the note arose from nonfarming operations. The proceedings then focused on whether a nonrecourse note should be included in the calculation of aggregate debt.[1] The bankruptcy court held that

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[1] FDIC also argued that more than twenty percent of Lindsey's obligations beyond the note in question arose from non-farming operations. Because both the bankruptcy court and the district court held that Lindsey's aggregate debt included the FDIC note, neither addressed the issue of

Lindsey's total debt did include the FDIC note and accordingly granted relief from the stay and dismissed the case. Lindsey appealed to the district court, which affirmed. Lindsey now appeals the district court's decision to this court.

II. Discussion

Lindsey contends that principles of statutory interpretation compel the conclusion that nonrecourse obligations should be excluded from the calculation of the aggregate debt of parties seeking Chapter 12 protection. The argument hinges on the Bankruptcy Code's definition of "debt" as "liability on a claim." 11 U.S.C. § 101(12). Because the FDIC note stipulates no "personal liability," Lindsey argues that there is no "liability on [the] claim" and therefore no "debt." If the FDIC note does not qualify as "debt" under the Bankruptcy Code, then it should not be calculated in Lindsey's aggregate debt. Lindsey would then qualify for Chapter 12 protection, as long as at least eighty percent of its remaining debt arose from farming operations.

[1] This appeal raises a question of law. The parties have stipulated the amount of the note and the percentage arising from operations. We must determine only the legal issue of whether nonrecourse notes qualify as "debt" under the Bankruptcy Code. We accordingly review the case *de novo*. *In re Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983).

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whether the remaining debt (taxes amounting to substantially less than $1,500,000) derived from nonfarming operations. In view of our discussion here, we too find no need for further examination of the issue.

A. The FDIC note as a "claim" under the Bankruptcy Code

[2] It is undeniable, as Lindsey "readily agrees," that the FDIC note constitutes a "claim" for the purposes of the Bankruptcy Code. Under the Code, "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). Nonrecourse notes clearly fall within this definition. At the very least, a creditor's right to act against collateral is a "right to an equitable remedy" for a debtor's breach of obligation. Moreover, the Bankruptcy Code explicitly incorporates nonrecourse loans as "claims." It provides that a "claim against the debtor" includes a "claim against property of the debtor." 11 U.S.C. § 102(2). The legislative history of the Code emphasizes that bankruptcy claims include nonrecourse loans:

> This paragraph [§ 102(2)] is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a

claim against the debtor personally, for the purposes of the bankruptcy code.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 315-16 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 27-28 (1978). As established by the above language, the FDIC note patently constitutes a "claim" under the Code.

Recent Supreme Court decisions support the interpretation of nonrecourse loans as "claims." In *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990), the Court concluded that Congress intended to adopt the broadest possible definition of the term "claim." *Id.* at 558, 110 S.Ct. at 2130. More specifically, the Court has held that a mortgage interest, *as a kind of nonrecourse loan*, constitutes a "claim" for bankruptcy purposes. *Johnson v. Home State Bank*, _____ U.S. _____, _____, 111 S.Ct. 2150, 2155, 115 L.Ed.2d 66 (1991) (emphasis added). We therefore conclude that the FDIC nonrecourse note undeniably qualifies as a "claim" under the Bankruptcy Code.

B. The FDIC note as a "debt" under the Bankruptcy Code

[3] Lindsey argues that although the FDIC note is a "claim," it is not a "debt," as "claim" and "debt" are distinguishable under the Bankruptcy Code. To support its assertion, Lindsey first points to the Code's definition of "debt" as "liability on a claim." 11 U.S.C. § 101(12). It then contends that because nonrecourse claims stipulate no personal liability, they do not qualify as "debt." To support its conclusion, Lindsey relies heavily on *In re Lands*, 85 B.R. 83 (Bankr. E.D.Ark. 1988), in which the court excluded from its calculation of aggregate debt a nonrecourse note which the

parties seeking Chapter 12 relief had not themselves executed, but which nonetheless encumbered their land.

We disagree with the argument that, by definition, nonrecourse notes do not constitute "debt." The *Lands* case is not apposite for two reasons. First, the parties there were not the makers of the nonrecourse note. In this case, by contrast, Lindsey executed the FDIC note. Moreover, *Lands* predates two Supreme Court decisions which interpret "claim" and "debt" as coextensive. The Supreme Court has determined that under the plain language doctrine, there is no distinction between "debt" and "claim" for the purpose of the Bankruptcy Code:

> Our construction of the term "debt" is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself . . . . [T]he Bankruptcy Code defines "debt" as a "liability on a claim." This definition reveals Congress' intent that the meanings of "debt" and "claim" be coextensive.

Davenport, 495 U.S. at 557-58, 110 S.Ct. at 2130 (citation omitted); *see also Johnson*, _____ U.S. at _____ n. 5, 111 S.Ct. at 2154 n. 5.

The legislative history of the Code further weakens Lindsey's contention that "debt" and "claim" are distinguishable: "The terms 'debt' and 'claim' are coextensive: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." H.R.Rep. No. 595, 95th Cong., 2d Sess. 23 (1978). Because FDIC undeniably has a "claim" against Lindsey, as established above, the FDIC note constitutes part of Lindsey's "debt." We agree with both the bankruptcy court and the district court that the note should be included in Lindsey's aggregate debt.

Lindsey attempts to distinguish *Davenport* and *Johnson* on the grounds that neither specifically applies to Chapter 12 eligibility. However, the Code defines "claim" and "debt" for the purposes of the entire title, not individual sections. Chapter 12 itself does not redefine either term for the sake of its eligibility requirements. We accordingly reject Lindsey's argument. Moreover, even if it appeared that in some circumstances "claim" could have a broader meaning than "debt" for the purposes of the Bankruptcy Code, we would not base the distinction purely on recourse/nonrecourse grounds. The Code defines "debt" as "liability on a claim," not *"personal"* liability on a claim. 11 U.S.C. § 101(12). "Personal liability" is a subcategory of "liability." Although a nonrecourse note stipulates no personal liability, it *does* impose a legal obligation. If the maker of the note fails to meet that obligation, the note holder has a remedy in the form of action against the collateral specified for the loan. Despite the fact that the remedy is limited, assuming the note is valid, it is legally enforceable. Even under this more liberal reading of Lindsey's arguments, then, we conclude that the FDIC note composes part of the partnership's aggregate debt and disqualifies it from Chapter 12 relief.

III. Conclusion

For the foregoing reason we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	§	
	§	
LINDSEY, STEPHENSON	§	
& LINDSEY, A	§	
PARTNERSHIP,	§	
	§	
APPELLANT,	§	
	§	
v.	§	2:92-CV-0061-J
	§	
FEDERAL DEPOSIT	§	
INSURANCE	§	
CORPORATION,	§	
	§	
APPELLEE.	§	

ORDER AFFIRMING BANKRUPTCY COURT DECISION

Before the Court is the appeal of the debtor, Lindsey, Stephenson & Lindsey, from a final judgment relieving the automatic stay and dismissing Chapter 12 proceeding of the Bankruptcy Court entered on July 1, 1991.

The main issue on appeal is whether the Bankruptcy Court erred in concluding that the non-recourse note secured by a mortgage held by the FDIC could be included as a part of the Debtor's aggregate debt for the purpose of determining eligibility under Chapter 12 of the Bankruptcy Code.

STATEMENT OF FACTS

This is an appeal from a judgment dismissing Chapter 12 bankruptcy proceedings. Debtor Lindsey, Stephenson & Lindsey filed for protection in December 1990. The FDIC responded with a motion for relief from stay against property of the estate and motion to dismiss the Chapter 12 proceeding on April 26, 1991. The FDIC argued that the debtor did not qualify for Chapter 12 relief because its aggregate debts exceeded $1,500,000.00.

The FDIC's argument is based on the fact that the Debtor is obligated under a non-recourse note in the amount of $1,670,972.84. This note was executed on September 16, 1985, made payable to Panhandle Bank & Trust Company in the amount of $1,069,612.17. The note was secured by partnership property and stated:

> The undersigned shall not be personally liable for the payment of the principal obligation evidenced by this Note nor for any accrued interest thereon, it being understood that the payee shall look only to the collateral as and to the extent provided by those certain Deeds of Trust and Security Agreements entered into by the undersigned and PANHANDLE BANK & TRUST COMPANY of even date herewith, which said Deeds of Trust and Security Agreements are hereby incorporated by reference and made a part hereof.

The FDIC, as liquidator of Panhandle Bank & Trust Company, began attempting to satisfy the note by foreclosing on the partnership's assets. The partnership then sought Chapter 12 protection as a family farmer.

The FDIC argues that the non-recourse note is included in the calculation of the Debtor's aggregate debts, so the aggregate debts exceed the statutory ceiling for relief under Chapter 12. The Debtor argues that because it is not liable on the note, the note is not included in the aggregate debt. The partnership is thus eligible for protection under Chapter 12. The parties stipulated that the balance due on the note exceeds $1,500,000 and that more than twenty percent of the balance due on the note did not arise from farming operations.

The issue to be decided in this appeal is whether the nonrecourse note should be included in Lindsey, Stephenson & Lindsey's aggregate debts in order to determine the Debtor's eligibility for Chapter 12 relief.

REASONING

Upon appeal, findings of fact made by the Bankruptcy Court are not to be set aside unless clearly erroneous. Bankr. R. 8013. Conclusions of law are subject to de novo review by this Court. In re Missionary Baptist Foundation of America, 712 F.2d 206, 209 (5th Cir. 1983). "When a finding of fact is premised on an improper legal standard, or a proper one improperly applied, that finding loses the insulation of the clearly erroneous rule." In Re Niland, 825 F.2d 801, 806 (5th Cir. 1987), citing Wilson v. Huffman, 818 F.2d 1135, 1142 (5th Cir. 1987).

Chapter 12 relief is only available to family farmers. 11 U.S.C. § 109(f). The Code limits the definition of family farmers to families with:

> (i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

> (ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts . . . on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership. . . .

The issue to be determined is what is included in the aggregate debts. The term "debt" is defined in 11 U.S.C. § 101(12) as "liability on a claim." "Claim" is defined in §101(5) as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured. [sic] unmatured, disputed, undisputed, secured, or unsecured.

The Bankruptcy Code further defines "claim against a debtor" in §102(2) to include a "claim against property of the debtor." The legislative history of this subsection states:

> This paragraph is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for purposes of the bankruptcy code [this title].

Notes of Committee on the Judiciary Senate Report No. 95-989.

The Supreme Court in Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. _____, 109 L.Ed.2d 588, 110 S.Ct. 2126 (1990), construed the meaning of the words "debt" and "claim" as coextensive. Id. at 2130. See also Johnson v. Home State Bank, 501 U.S. _____, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991). The Court explained that Congress intended to adopt the broadest available definition of "claim." See Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. _____, 109 L.Ed.2d 588, 110 S.Ct. 2126 (1990), Johnson v. Home State Bank, 501 U.S. _____, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991).

The FDIC's nonrecourse note is a claim against the Debtor under §102(2). Following the Supreme Court's rationale that a claim and a debt are coextensive, the FDIC's claim is a debt for the purpose of determining Debtor's aggregate debts. Debtor's aggregate debts, including the nonrecourse note, total more that [sic] $1,500,000. This Court confirms the Bankruptcy Court's determination that Debtor is ineligible for Chapter 12 relief.

CONCLUSIONS

The findings of fact of the Bankruptcy Court stand on appeal because they are not clearly erroneous. Accordingly, the decision of the Bankruptcy Court is therefore AFFIRMED.

It is SO ORDERED.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

14a & 15a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9025

IN THE MATTER OF:
LINDSEY, STEPHENSON & LINDSEY,
Debtor.

LINDSEY, STEPHENSON & LINDSEY,
d/b/a Great Plains Land & Cattle,
Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(August 23, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

FILED
JAN 21 1994
OFFICE OF THE CLERK

No. 93-804

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDSEY, STEPHENSON & LINDSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a non-recourse secured note creates a "debt" for purposes of 11 U.S.C. 101(12) (Supp. IV 1992).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Comprehensive Accounting Corporation v. *Pearson (In re Pearson)*, 773 F.2d 751 (6th Cir. 1985)	6
Johnson v. *Home State Bank*, 111 S. Ct. 2150 (1991)	3, 4, 5
Pennsylvania Department of Public Welfare v. *Davenport*, 495 U.S. 552 (1990)	3, 4, 5
Quintana v. *Commissioner (In re Quintana)*, 915 F.2d 513 (9th Cir. 1990)	5

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
Ch. 1, 11 U.S.C. 101 *et seq.*:	
11 U.S.C. 101(4) (1988)	3
11 U.S.C. 101(5) (Supp. IV 1992)	3, 4
11 U.S.C. 101(11) (1988)	3
11 U.S.C. 101(12) (Supp. IV 1992)	3, 4
11 U.S.C. 101(17) (1988)	3
11 U.S.C. 101(18) (Supp. IV 1922)	3, 4
11 U.S.C. 101(18)(A) (Supp. IV 1992)	
11 U.S.C. 101(18)(B)(ii) (Supp. IV 1992)	4
11 U.S.C. 102(2)	3, 4, 5
11 U.S.C. 109(e)	6
11 U.S.C. 109(f)	2, 4
Ch. 12, 11 U.S.C. 1201-1231	2
Ch. 13, 11 U.S.C. 1301-1330	6
12 U.S.C. 1823(c)(2)(A) (1988)	2

In the Supreme Court of the United States

OCTOBER TERM, 1993

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LINDSEY, STEPHENSON & LINDSEY, PETITIONER

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FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 995 F.2d 626. The opinion of the district court (Pet. App. 9a-13a) is reported at 158 B.R. 75. The opinion of the bankruptcy court (App., *infra*, 1a-2a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. A petition for rehearing was denied on August 23, 1993. Pet. App. 16a. The petition for a writ of

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[1] The petition states (Pet. 1) that the opinion of the bankruptcy court appears at Pet. App. 14a-15a, but those pages are not included in the copies of the petition served on the government.

certiorari was filed on November 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a partnership composed of four individuals (two solely as individuals and two both as individuals and as officers of estates). On September 16, 1985, the four individuals who are partners executed a promissory note payable to Panhandle Bank & Trust Company in the original principal amount of $1,069,612.17. Payment of the note was secured by real and personal property owned by petitioner in Hutchinson, Randall, and Deaf Smith Counties in the State of Texas. The note also contained what is commonly referred to as a nonrecourse provision, which stated that the makers of the note "shall not be personally liable for the payment of the principal [and interest] evidenced by this Note * * *, it being understood that the payee shall look only to the collateral [as provided in certain other documents executed on the same day]." When the bank failed in 1986, the Federal Deposit Insurance Corporation (FDIC) acquired the note in its corporate capacity by means of a purchase and assumption transaction conducted pursuant to 12 U.S.C. 1823(c)(2)(A) (1988). See Pet. App. 2a-3a; FDIC C.A. Br. 4-5; FDIC C.A. App. A108-A109.

2. In December, 1990, petitioner filed a petition seeking relief under Chapter 12 of the Bankruptcy Code, 11 U.S.C. 1201-1231. The FDIC filed a motion urging that the case be dismissed, arguing that petitioner was ineligible for relief under Chapter 12 because it had aggregate debts of more than $1,500,000, the maximum permitted for a Chapter 12 debtor under Sections 109(f) and

101(18).[2] The parties stipulated that the balance due on the note at that time exceeded $1,500,000, but petitioner argued that it did not represent a "debt" for purposes of the aggregate debt limitation. The bankruptcy judge granted the FDIC's motion, stating that "[t]he court finds that the nonrecourse debt must be counted for these purposes." App., *infra*, 2a (citing *Johnson* v. *Home State Bank*, 111 S. Ct. 2150 (1991)); see Pet. 3; Pet. App. 3a.

3. The district court affirmed. Pet. App. 9a-13a. The court explained that the nonrecourse note constitutes a "claim against the debtor" under Section 102(2), which defines the term "claim" to include a "claim against property of the debtor." Pet. App. 13a. The court then concluded that the note also must be considered to be a "debt," because this Court had "construed the meaning of the words 'debt' and 'claim' as coextensive." *Ibid.* (citing *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552 (1990)). Since the note constituted a debt, the court concluded that petitioner's aggregate debts exceeded the $1,500,000 limitation and thus affirmed the bankruptcy court's dismissal of petitioner's bankruptcy case.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court first accepted petitioner's concession that the note constituted a "claim." *Id.* at 5a-6a. The court then con-

[2] For convenience, this brief refers to the current version of Title 11 (1988 & Supp. IV 1992) by Section number only. We note that several of the provisions cited in this brief were renumbered in 1990. The definition of "claim," formerly codified at 11 U.S.C. 101(4) (1988), now appears at 11 U.S.C. 101(5) (Supp. IV 1992). Similarly, the definition of "debt" in 11 U.S.C. 101(11) (1988) now appears at 11 U.S.C. 101(12) (Supp. IV 1992), and the definition of "family farmer" in 11 U.S.C. 101(17) (1988) now appears at 11 U.S.C. 101(18) (Supp. IV 1992).

cluded that the note falls within the statutory definition of a debt as "liability on a claim." *Id.* at 6a-8a (quoting Section 101(12)). The court stated that this Court has interpreted "claim" and "debt" as having coextensive meanings. Pet. App. 7a (quoting *Davenport*, 495 U.S. at 558). The court also explained that, aside from this Court's interpretation of the word "debt," the note created "liability on a claim," even if petitioner had no "personal" liability: "'Personal liability' is a subcategory of 'liability.' Although a nonrecourse note stipulates no personal liability, it *does* impose a legal obligation [enforceable by] a remedy in the form of action against the collateral specified for the loan." Pet. App. 8a.

ARGUMENT

Petitioner argues that a nonrecourse secured note does not create a debt for purposes of the definition of "debt" in Section 101(12) of the Code. The contrary conclusion of the court of appeals is correct and does not warrant review by this Court.

1. Section 109(f) of the Bankruptcy Code limits relief under Chapter 12 to debtors who are "family farmer[s]." Section 101(18), in turn, limits the term "family farmer" to individuals and entities "whose aggregate debts do not exceed $1,500,000." Section 101(18)(A), and (B)(ii). Under Section 101(12), a "debt" is "liability on a claim." Finally, under Section 101(5), the term "claim" includes both a "right to payment" and any "right to an equitable remedy for breach of performance."

Petitioner correctly concedes that a secured nonrecourse note constitutes a "claim" for purposes of Section 101(5), because such an instrument creates a right to a remedy against property of the debtor. See Section 102(2) ("'claim against the debtor' includes claim against

property of the debtor").[3] But the reasoning that supports that concession also justifies a conclusion that the instrument creates a "debt." See *Pennsylvania Department of Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990) (referring to "Congress' intent that the meanings of 'debt' and 'claim' be coextensive"). As the court of appeals explained, a non-recourse provision excludes only *personal* liability. The nonrecourse provision in this case did not exclude all liability on the note; rather, it expressly preserved the liability of the collateral. As this Court has recognized in a closely related context, the Bankruptcy Code recognizes the existence of those two separate forms of liability on the part of a debtor. See *Johnson* v. *Home State Bank*, 111 S. Ct. 2150, 2154 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*."). Because the note and related security documents created "liability" on the claim for repayment of the note, the agreements create a "debt" for purposes of the Bankruptcy Code. See *Quintana* v. *Commissioner* (*In re Quintana*), 915 F.2d 513, 516-517 (9th Cir. 1990) (a claim constitutes a "debt" for purposes of the Chapter 12 limitation even if the creditor has no right to enforce the claim against the debtor personally).

2. Contrary to petitioner's contention (Pet. 5), the decision of the court of appeals does not conflict with the

[3] Although the note in this case was executed by petitioner's partners, rather than petitioner itself, under Section 102(2) it plainly constitutes a claim against petitioner. Petitioner does not suggest that the fact that petitioner did not execute the note has any relevance to the question of whether the note creates a "debt" of petitioner.

Sixth Circuit's decision in *Comprehensive Accounting Corporation* v. *Pearson* (*In re Pearson*), 773 F.2d 751 (1985). *Pearson* did not involve a nonrecourse debt, but rather the question of whether a particular debt was "liquidated" even though at the time the petition was filed there was a "substantial dispute regarding liability and amount." *Id.* at 754. That question was relevant because that case was filed under Chapter 13 of the Bankruptcy Code, under which relief is limited to debtors with "noncontingent, liquidated, unsecured debts of less than $100,000." Section 109(e). The analysis of the *Pearson* court thus has no relevance to the question presented by the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION

IN RE:

LINDSEY, STEPHENSON & LINDSEY,
a parternship composed of Tommy Lindsey, Jacquelynn Joy Stephenson and Jo Carol Lindesy, d/b/a Great Plains Land & Cattle,

Debtor

In Proceedings Under Chapter 12 of the Bankruptcy Code Case No. 290-20491-12

[Filed July 1, 1991]

Judgment Relieving the Automatic Stay And Dismissing Chapter 12 Proceedings

On December 31, 1990, Lindsey, Stephenson & Lindsey, a partnership (Debtor) filed for relief under Chapter 12 of the Bankruptcy Code. On February 12, 1991, the Federal Deposit Insurance Corporation as the successor to Panhandle Bank & Trust Company (FDIC) filed a motion to be relieved from the automatic stay, asserting that the Debtor was not eligible for Chapter 12 relief.

In order to be eligible for Chapter 12 relief, a debtor's aggregate debts must not exceed $1,500,000.00. *See* 11 U.S.C. § 109(f) and 11 U.S.C. 101(17)(B). The parties stipulated that if the nonrecourse note held by the FDIC was included in that calculation, the Debtor was not

eligible for Chapter 12 relief. The court finds that the nonrecourse debt must be counted for these purposes. *See Johnson* v. *Home State Bank*, ___ U.S. ___, 59 U.S.L.W. 4609 (1991)

It is therefore ORDERED that:

1. The automatic stay of 11 U.S.C. § 362 is relieved to permit the FDIC to foreclose the liens which is holds.